INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

THIRD PARTIAL FINAL AWARD (CONCERNING CLAIMANTS' APPLICATION FOR INTERIM RELIEF IN RELATION TO FOREIGN ARBITRATIONS)

ARBITRATION PURSUANT TO
THE COMMERCIAL ARBITRATION RULES OF
THE AMERICAN ARBITRATION ASSOCIATION

BETWEEN:

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and LATAM TOWERS, LLC, on its own behalf and derivatively on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants,

vs.

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC., JORGE HERNÁNDEZ and ALBERTO ARZÚ,

Respondents,

and

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent,

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC. derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Counterclaimants,

vs.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY) LTD.,

Counterclaim Respondents.

-and-

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent.

AMLQ HOLDINGS (CAY) LTD.,

Counterclaimant,

vs.

TERRA TOWERS CORP. and TBS MANAGEMENT,S.A.

Counterclaim Respondents.

A. Introduction

1. Claimants Telecom Business Solution, LLC and Latam Towers, LLC ("Peppertree")[1], together with AMLQ Holdings (Cay) Ltd.[2], initially a "Notice Party" and later named as a Counterclaim Respondent (hereinafter for ease of reference, collectively "Claimants" or "PPT/AMLQ") have applied to the Tribunal for an "anti-suit injunction" and/or other interim measures pursuant to Rules R-37 and R-47(a) of the Commercial Arbitration Rules of the American Arbitration Association, 2013 version, which apply to this case.

2. This application (the "Application") followed a notification to the Tribunal by counsel to nominal party Continental Towers LATAM Holdings Limited (the "Company") initially on January 3, 2023 and in more detail on January 6, 2023, that an arbitration case had been filed in Peru with the

[1] The Claimants referenced as "Peppertree" are controlled by a private equity firm, Peppertree Capital Management, Inc.
[2] AMLQ is an affiliate of Goldman Sachs & Co., LLC.

Arbitration Center of the Chamber of Commerce of Lima against the Company and Peppertree by the Company's Peru-based, Peru-organized wholly-owned indirect subsidiaries, and the Company Managers of those subsidiaries as co-Claimants, that allegedly made the same claims and sought the same damages already claimed by Respondents in this arbitration in counterclaims submitted in 2021. Those counterclaims were directly impacted by our Partial Final Award No. 2 ("2d PFA"), issued August 12, 2022, which determined that as a sanction under AAA Commercial Rule R-58 we would stay proceedings on the counterclaims pending compliance by Respondents with certain of our prior orders.[3] Two of the Respondents[4], Terra Towers Corp. and TBS Management, S.A. ("Terra"), each 100% owned and controlled by individual Respondent Jorge Hernandez, are together the majority Shareholders of the Company, while PPT/AMLQ are the minority Shareholders.

3. The Company develops, owns and operates wireless telecommunications towers ("Towers") in eight Central and Latin American countries including Peru and Guatemala. PPT/AMLQ have equity at the top, holding company, level of the Company. "On the ground" in each country in the Company's territory, operations are conducted in the name of indirect wholly-owned subsidiaries of the Company, each of which has one or more Company Subsidiary Managers. But this corporate structure is truly nominal because, based upon various contracts, and in reality, the operations are run by Respondent DT Holdings ("DTH") — 100% owned by Mr. Hernandez — through its affiliates organized in and under the laws of each country in the Company's operating territory,

[3] This stay was implemented in a contemporaneous procedural order.

[4] The Respondents named in the Demand for Arbitration also include DT Holdings Inc. ("DTH", another entity 100% controlled by Jorge Hernandez, and Alberto Arzu. Mr. Arzu was later replaced by Alejandro Sagastume as a Terra-appointed member of the Company's Board of Directors. At all relevant times up to February 10, 2023, Mr. Hernandez and Mr. Sagastume were the Terra-appointed members of the Company's Board of Directors. On February 10, 2023, Respondents notified the Tribunal that Terra had replaced Mr. Hernandez as a Board member with William Mendez Araujo, known to the Tribunal from prior proceedings as a Terra staff attorney. This change in the composition of the Company's Board is discussed later in this Award.

and the respective employees and contractors of each such affiliate. This is based on a contractual arrangement between PPT/AMLQ and Terra that provides for the Shareholders to pay DTH to furnish its personnel and infrastructure to the Company subsidiaries.

4. DTH however does not develop and operate Towers exclusively for the Company. Especially where the Company elects not to participate in a Tower development project proposed by DTH — which is to say, when the Company's Board is deadlocked because the Peppertree-appointed Directors oppose the project -- DTH may develop the Towers for itself or in concert with others. The Company Subsidiary Managers have multiple roles at DTH, working on Tower development and operations both for Company-adopted Tower projects and for non-Company Tower projects. Thus as a practical matter and in day-to-day operations, the Company Subsidiary Managers throughout the territory, including in Peru and in Guatemala, work for Mr. Hernandez.

5. These operating arrangements underlie the submissions by PPT-AMLQ that the Peru arbitration, and another similar arbitration filed January 13, 2023 at the Arbitration Center of the Chamber of Commerce of Guatemala – by the Company's Guatemala-organized indirect operating subsidiaries and their Company Subsidiary Manager -- are a product of collusion between Mr. Hernandez (on behalf of himself and the other Respondents) and the Company Subsidiary Managers as his and the other Respondents' agents.

6. After we granted PPT/AMLQ leave to file an application for interim relief including an anti-suit injunction against the Peru arbitration on January 4, 2023, Claimants reported that an agreement had apparently been reached among the Parties to bring about the termination of the Peru arbitration. Claimants asked that the deadline to file their application be suspended. This was request was granted on January 12, 2023. But on January 20, PPT/AMLQ informed the Tribunal that there was no agreement on termination of the Peru arbitration, that in the meantime the Guatemala arbitration had been commenced, and that they wished to proceed urgently with their

Application. We refer to the Peru and Guatemala arbitrations together as the "Foreign Arbitrations", to the Company Subsidiaries that are Claimants in those arbitrations as the Foreign Arbitration Corporate Claimants ("FACCs"), and to the Company Subsidiary Managers who are Claimants in the Foreign Arbitrations as the "Manager Claimants".

7. Terra and the other Respondents contended, in opposition to the Application, that they have supported and will advance the position of the Company and of PPT/AMLQ in the Foreign Arbitrations that exclusive arbitral jurisdiction over the subject matter of the Foreign Arbitrations and over PPT/AMLQ rests with this Tribunal. They emphasized that one of the two Terra-appointed Directors on the Company's Board, Mr. Hernandez, had responded to the filing of the Peru Arbitration by sending the Peppertree Directors a proposed Board resolution, already signed by him, that would disapprove the Peru Arbitration and call upon the Peru FACC and the Peru Manager Claimants to withdraw that action (Ex. R-7). Based on this evidence, Respondents contended that handling of the Foreign Arbitrations should be a Board matter and not an occasion for any intervention by the Tribunal.

8. Based on the submissions we have invited and received since then, and the oral argument hearing we conducted on February 2, 2023, and the change in Terra's representation on the Company's Board notified to the Tribunal on February 10, 2023 while the Application was *sub judice* (*see* para. 17 below), we find the Application to be meritorious and grant interim relief in the form of an Award as specified in the decretal paragraphs at the end of this Award. To summarize, we award a mandatory injunction requiring the Respondents to terminate the Foreign Arbitrations and to prevent the commencement of additional similar arbitrations, to confirm to the Tribunal that this has been accomplished, and if they should fail to accomplish these mandatory measures, then to indemnify and hold hamless PPT/AMLQ against damages and other

costs they may sustain as a result of the Foreign Arbitrations and as security for such indemnification to provide an escrow of funds in specified amounts.

9. As this is a Partial Final Award concerning interim relief, we clarify what we do not determine today but expressly reserve for a possible future determination: (1) what relief if any might be granted in favor of PPT/AMLQ against the FACCs and Manager Claimants; and (2) what additional relief if any might be appropriate if additional Foreign Arbitrations are filed that purport to submit to arbitration in other countries in the Company's territory, or as additional arbitrations in Peru or Guatemala or elsewhere, disputes that are being or that could be submitted to arbitration under the arbitration agreements applicable in this case.

B. Relevant Elements of the Prior Proceedings

10. Peppertree commenced this arbitration on February 3, 2021 after Terra failed and refused to join with PPT/AMLQ in selling the Company pursuant to Peppertree's notice, given pursuant to the SHA, of its desire to sell the Company. Among Peppertree's claims was a cause of action for specific performance of the SHA's provisions for sale of the Company upon Peppertree's and AMLQ's request for a Company sale upon expiration of the five-year holding period applicable to the shares in the Company, which they acquired in 2015 pursuant to contracts (the most relevant terms of which, for this Application, are discussed below). We entered a Partial Final Award granting such specific performance on February 24, 2022 ("1st PFA"). The U.S. District Court for the Southern District of New York recognized and enforced that Award pursuant to the Federal Arbitration Act and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), and denied Respondents' motion to vacate, in a decision of the Hon. Lewis A. Kaplan, USDJ, issued January 18, 2022, upon which judgment was entered on that date.

11. Terra in its Answer and Counterclaim in this arbitration in 2021 set forth, notably at paras. 22 *et seq.* and particularly as to alleged improper rejections of Towers projects by Terra, *e.g.*, paras. 55-76, facts concerning Peppertree's alleged improper, irrational and bad faith rejection of Terra's tower development proposals. The counterclaim pleading refers to these allegations collectively

as the "Tower Rejection Breach," and at paras. 146-163 states four causes of action based on the Tower Rejection Breach (and other alleged breaches): "Breach of Contract," "Breach of Fiduciary Duties of Care, Loyalty and Good Faith," "Breach of Fiduciary Duty of Candor" and "Conspiracy to Commit Breach of Fiduciary Duty". Terra sought money damages "in excess of $186,616,810 …. for the loss of enterprise value to the Company resulting from approximately 3,000 rejected tower acquisitions." (first request for relief at p. 117). These allegations were based upon the conduct of the Peppertree-appointed Board members carrying out the Board's Development Committee function. As discussed below in para. 105, the Foreign Arbitrations purport to place that same conduct under review before different arbitral tribunals under different rules, in Lima and in Guatemala City, under the laws of Peru and Guatemala.

12. We made a procedural order at an early stage of the arbitration that provided for Respondents' counterclaims to be addressed in a Phase 2 of the arbitration after the Company sale-specific performance question was addressed in Phase 1. Beginning about September 2021 and continuing after we issued the 1st PFA in February 2022 directing the sale of the Company, Respondents pursued a series of measures designed, first, to replace the Company's CEO through unilateral actions of Terra, DTH and Mr. Hernandez, and to discredit and disparage that Company CEO as a justification for the unilateral actions taken. We first ordered interim relief to halt such actions and restore the Company's CEO to his position, in November 2021. That Order was not complied with by Respondents and we had further proceedings concerning compliance and sanctions for non-compliance.

13. This led to an order of our Tribunal in March 2022 that, among other things, required Respondents to cause DTH affiliates that had published disavowals of their relationship with the Company CEO, Mr. Gaitán, to withdraw and correct those publications to make clear that Mr. Gaitán's status was as we declared it to be in our November 2021 order. Respondents did not comply with the March 2022 order either. After Claimants sought further sanctions, and given Respondents' insistence that their refusal to comply was justified, we determined to hold evidentiary hearings to determine the validity of the various allegations made by Respondents about the alleged unfitness of Mr. Gaitán to hold the position of Company CEO, and to continue to be employed in any capacity by any DTH entity -- allegations that Respondents had invoked to bring criminal complaints against Mr. Gaitán in a Guatemala court and to obtain *ex parte* asset freeze orders

against Mr. Gaitán (and certain other DTH employees allegedly aligned with him) from a judge of that court.

14. After proceedings in which Respondents participated only as observers, declining to provide evidence or to cross-examine witnesses on the basis of an argument that this Tribunal was *functus officio*, we made a second Partial Final Award that imposed sanctions for Respondents' non-compliance with our orders. ("2d PFA"). The 2d PFA, dated August 12, 2022, as relevant here, determined that, as a sanction under AAA Commercial Rule R-58, proceedings on Respondents' counterclaims would be stayed until Respondents had complied with the 1st PFA[5], the 2d PFA and our orders in (*inter alia*) November 2021 and March 2022. Respondents did not, and have not, complied. Instead, they have moved to vacate the 2d PFA, which PPT/AMLQ have applied to have recognized and enforced.

15. Respondents also commenced two separate litigations that are now pending as related cases before Judge Kaplan in the Southern District of New York. The first action seeks to set aside a written agreement made in March 2021, by which the Parties selected counsel to represent the Company in this arbitration, an agreement whose validity we recognized in our November 2021 Order. The suit includes allegations of legal malpractice against Company counsel. The second action, filed within two weeks after our 2d PFA, seeks a declaratory judgment that the members of this Tribunal are unfit to continue serving, on the basis of bias, and an order directing that a new tribunal be selected pursuant to the arbitration clause of the SHA.[6]

16. The Parties' respective positions concerning the Foreign Arbitrations stand to be assessed by the Tribunal not only on the basis of the record that has been made before us in January-February 2023, and the relevant terms of the Parties' contracts with one another, but in the procedural

[5] We required such compliance unless that Award was vacated or its recognition and enforcement was refused, but on January 18, 2023 recognition and enforcement was granted and the motion to vacate was denied.

[6] The Tribunal has not been given the complaint or otherwise reviewed its contents (the complaint is under seal in the federal court) but became aware of the suit when its existence was made public by Law360 on August 30, 2022. We have continued to sit as the Tribunal in this matter for the reasons outlined at note 8 in the 2d PFA.

context just recited. Claimants contend that the Foreign Arbitrations are instigated by Respondents and are an attack on the authority of this Tribunal and the integrity of the arbitration, including our 1st and 2d PFAs and our November 2021 and March 2022 orders, and a circumvention of the stay imposed by the 2d PFA. Respondents contend that the Foreign Arbitrations are the independent handiwork of the Peru and Guatemala Company Subsidiary Managers who filed them, and that although Respondents agree with the positions expressed by those managers, they are nevertheless aligned with PPT/AMLQ in seeking to bring about termination of the Foreign Arbitrations. This alignment, Respondents contend, makes the question of what to do about the Foreign Arbitrations a matter to be addressed by the Company's Board, not the Tribunal.

17. One new potentially pertinent fact emerged on February 10, 2023. Respondents notified the Tribunal that Terra had replaced Mr. Hernandez as one of its two appointees on the Company's Board. His replacement is William Mendez Araujo. The Tribunal received evidence about activities by Mr. Mendez Araujo in connection with our 2d PFA. As our findings herein might be seen to be affected by how we perceive this change, we note the following matters in regard to Mr. Mendez that were determined in the 2d PFA:
    a. Mr. Mendez Araujo is an in-house attorney for the Respondents. (2d PFA at para. 54)
    b. Mr. Mendez Araujo's father, William Rene Mendez, was outside counsel to Respondent DTH in Guatemala who represented DTH in filing a criminal complaint against Mr. Gaitán. (Id. & para. 69)
    c. Mr. Mendez Araujo was in attendance at a meeting of Mr. Hernandez with Mr. Gaitán and others in Respondents' offices in Guatemala City in September 2021 (Id. para. 64)
    d. Mr. Mendez Araujo participated in a search of Mr. Gaitán's car on the occasion of that meeting, at the instruction of Mr. Hernandez, that revealed no evidence of any wrongful taking of property by Mr. Gaitán but was portrayed to the Guatemala court by Mr. Mendez Araujo's father as evidence of theft by Mr. Gaitán, and that the Tribunal determined to have been mis-represented by Respondents in submissions to this Tribunal and to the Guatemala courts via Mr. Mendez Araujo's father as outside counsel (Id. paras. 69, 78(d)(f)).
    e. Mr. Mendez Araujo's father, William Rene Mendez, was also co-counsel on behalf of DTH in the filing of a second criminal complaint in January 2022, which was against Mr. Gaitán

in its eventual formulation (Id. para. 83), and which the Tribunal determined to have been baseless and based on a mis-portrayed version of the September 2021 encounters at Respondents' Guatemala City offices, to which William Mendez Araujo had been an eyewitness. (Id. paras. 85(5)(6), 88).

f. Mr. Mendez Araujo's father was ordered to appear in the proceedings before this Tribunal and did not appear. (Id.)

g. To support allegations of criminal activity by Mr. Gaitán, Respondents solicited a memorandum regarding FCPA compliance from the law firm Morrison & Foerster. Mr. Mendez Araujo was "the principal link between Respondents and Morrison & Foerster, and who actively solicited the Morrison Memorandum from Morrison" (Id. para. 85(b)), which solicitation was determined by the Tribunal to have been an unauthorized effort by Respondents, purportedly but not actually on behalf of the Company, to obtain a legal opinion that the Company bore compliance and liability risks if it permitted Mr. Gaitán to function as CEO. (Id. paras. 90-104). The Tribunal also found that Respondents failed to inform Morrison & Foerster of material information that was necessary for it to render a reliable opinion.

C. Relevant Provisions of the Parties' Contracts

18. To further place in context Respondents' contentions and submissions – in summary that the Foreign Arbitrations involve independent and unauthorized actions of the FACCs and the Manager Claimants against the wishes and directions of Mr. Hernandez (and by implication Terra, and DTH, which he owns and controls) -- it is helpful to summarize certain provisions of the network of contracts that were made when the minority shareholders, PPT/AMLQ, invested in the Company in October 2015.

C.-1. The Subscription and Contribution Agreement

19. PPT/AMLQ were required to devote roughly $101 million of their total initial investment of $112.6 million to pay off existing bank debt of (1) Terra, (2) the holding company through which Terra owned and controlled the Company Subsidiaries and (3) the Company Subsidiaries themselves. That includes the Company Subsidiaries that are now the FACCs. The Subscription and Contribution Agreement (the "S&C Agreement") required PPT/AMLQ to pay that sum directly to the bank creditors at the Closing. (S&C

Agreement at Section 1.02). In other words, the 2015 deal between the Parties initially took the form of a capital re-structuring, whereby Terra and its operating subsidiaries were able to have their bank debt paid off by PPT/AMLQ, to whom new equity in the Company was issued in exchange.

20. Second, the S&C Agreement recited that the entities that are now the FACCs (or their direct predecessors in interest, certain formal but non-substantive re-organizations have thereafter occurred) were among Terra's "regional operating Subsidiaries in Central America." Terra represented and warranted that it had "*full corporate power and authority to carry on the business in which it is engaged and to own and use the properties owned and used by it.*" (Section 2.01).

21. Terra further represented that it had "*full power and authority … to execute and deliver this Agreement and the other Transaction Documents to which it is a party, to perform its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby.*" (Section 2.02). In other words, Terra represented and warranted that it had complete control over the entities in its corporate universe, including the FACCs, insofar as relevant to Terra's performance of the obligations Terra undertook toward PPT/AMLQ in consideration of their $112.6 million investment. Specifically, Terra gave a representation and warranty that "*This Agreement [has] been duly and validly executed and delivered by the Target Company and the relevant Target Subsidiaries and constitute(s) the legal, valid and binding obligation[] of the Target Company and the relevant Target Subsidiaries…*" except as limited by applicable creditors' rights laws and general equitable principles. (Id. Section 3.02). The Whereas clauses of the S&C agreement defined "Target Subsidiaries" to include the entities that are now the FACCs.

22. The fair reading of the S&C Agreement (and related agreements discussed below) is that PPT/AMLQ by entering into these agreements, accepted and relied upon Terra's representations and warranties about its "full power and authority" over the Company Subsidiaries including the FACCs and the due and valid execution and delivery of the S&C Agreement by, and the binding obligation of the S&C Agreement with respect to, each of those Company Subsidiaries.

23. The making of those representations by Terra was part of the contractual exchange for Terra to obtain the PPT/AMLQ investment and simultaneous payoff of corporate debt without having to make each and every one of the Company Subsidiaries, in the eight Central and South American countries where Terra was doing business, individually a Party to the S&C Agreement and the other agreements made at that time (as discussed below).

24. Further, the representations and warranties mentioned above were defined in the S&C Agreement as "Fundamental Representations" (Section 7.06 (c)) and the post-Closing "survival" of these Fundamental Representations was extended to the "expiration of the statute of limitations period applicable to the underlying subject matter of such representation and warranty" (Section 7.01(a) and (b)(ii). Accordingly, these Terra representations and warranties with respect to the FACCs and other similar Company Subsidiaries (and by implication their respective Managers) were continuing representations as well as "Fundamental Representation[s]."

25. The S&C Agreement contained an arbitration clause effectively identical to the arbitration clause in the Shareholders' Agreement ("SHA"). As a result, PPT/AMLQ made their initial investment with the reasonable expectation that the only forum in which Respondents or their Corporate Subsidiaries could subject PPT/AMLQ to dispute resolution would be a Tribunal constituted under the arbitration clauses of the S&C Agreement and/or the SHA, and therefore that a dispute about the authority of the FACCs to act autonomously, *i.e.* other than subordinate to the pre-existing "full corporate power and authority" of Terra that was transferred to the (re-capitalized, re-structured) Company as a result of the transaction, would be arbitrated in New York in English under the AAA Commercial Rules and under the arbitration laws applicable by virtue to choosing New York as the seat of arbitration.

26. The broad arbitration clause found in Sections 8.10-8.11 of the S&C Agreement – and replicated or cross-referenced in the other agreements discussed below – specifies that "any dispute regarding… [the Agreement's] enforceability" -- which per force includes a dispute regarding the enforceability of the arbitration agreement itself -- will be arbitrated in New York in English under the AAA Commercial Rules and (by necessary implication unless otherwise agreed) under the arbitration laws applicable at a New York seat of arbitration. And in Section 8.08 of the S&C Agreement – also replicated or referenced in the other agreements discussed below – the Parties stipulated that any breach of the Agreement causes irreparable harm, entitles the non-breaching party to specific performance, and warrants "the issuance of an injunction or the enforcement of other equitable remedies against it at the suit of an aggrieved party without the posting of any bond or other security."

27. By reason of the filing of the Foreign Arbitrations, the Company and Peppertree have already been forced, in order to avoid default, to submit a written objection to arbitral jurisdiction in the Peru

arbitration. (Ex. R- 25)[7] If the Foreign Arbitrations are not withdrawn, the arbitrators appointed in those arbitrations will decide what if any effect on their jurisdiction arises from (i) the arbitration agreements between the Parties here, and (ii) the prior submission by Terra of the same disputes before this Tribunal. (See Respondents' Original Answer and Counterclaims, dated February 19, 2021, at paras. 22 et seq. and particularly as to alleged improper rejections of Towers projects by Terra, e.g., paras. 55-57, 61-76)

C.-2. The Shareholders' Agreement (SHA)

28. The powers ostensibly available to the FACCs through their Managers in Peru and Guatemala feature prominently in this Application. Respondents have placed in the record constitutive documents of the FACCs about the scope of their and their Managers' powers under national law in those nations.

29. But the Application here concerns the duties owed to one another by the Shareholders of the Company as expressed in their Agreements, all of which are governed by the laws of New York. So we take a "top down" view – in terms of the corporate structure of the Company -- of the question of what conduct by the FACCs and the Manager Claimants may be tolerated by the Shareholders without effective intervention to direct their conduct or to replace those Manager Claimants with persons who would carry out rather than defy the Company's will and the Shareholders' obligations to one another.

30. Pursuant to the "WHEREAS' clauses forming the Preamble of the SHA, the post-Closing corporate structure of the Company was established. The Company owns 100% of a subsidiary called (in abbreviated format) Interco BVI. Interco BVI in turn owns 100% of the shares of BVI companies that had been direct subsidiaries of Terra. These are defined in the Agreement as the CT BVI Subsidiaries. Before the 2015 transaction, the CT BVI Subsidiaries, then Terra subsidiaries, owned, directly or indirectly, 100% of the shares of the locally-incorporated operating subsidiaries in each of countries where Terra operated (defined post-Closing as "CT Subsidiaries"), including the FACCs. Post-transaction, those FACCs, as CT Subsidiaries, have been 100% owned and controlled (via Interco and another layer of holding entities) subsidiaries of the Company.

31. The "**Constitutional Documents**" of the CT Subsidiaries were attached as Schedule 1 of the SHA, per Section 2.01 thereof. In that Section, "*[t]he Shareholders and the Company agree to take all necessary*

[7] As of the date of the last submissions on this arbitration the deadline for filing an Answer in the Guatemala arbitration had not arrived.

action to ensure that the above-mentioned organizational documents are modified to reflect the matters set out in this Agreement." (emphasis supplied). This language is important, because the "**Constitutional Documents**" of the Peru and Guatemala CT Subsidiaries, the FACCs, contain arbitration clauses, and, at least according to the FACCs and Manager Claimants, purport to authorize them under the laws of Peru and Guatemala to do what they have done in commencing the Foreign Arbitrations. (Company Ex. A (Peru Demand for Arbitration), PPT/AMLQ Ex. Q (Guatemala Demand for Arbitration)).

32. But the import of the language in Section 2.01 of the SHA, just quoted, is that any such language of the local level operating subsidiaries' arbitration clauses could not mean, as between the Company's Shareholders, that the CT Subsidiaries could bring arbitrations on subject matter arbitrable between the Shareholders under Sections 8.14-8.15 of the SHA (tracking Sections 8.10-8.11 of the S&C Agreement), and could not mean that the CT Subsidiaries could bring arbitration claims against PPT/AMLQ. The import of the quoted language in Section 2.01 is that, insofar as local law in Peru or Guatemala or in any other country hosting a CT Subsidiary would support an interpretation that local arbitrations are within the powers of CT Subsidiaries, then the Shareholders and the Company are obligated to "*take all necessary actions*" to modify those powers, or to cause them to be construed and applied as not having such meaning.[8]

33. Two representations and warranties of the Shareholders made in Section 2.02 bear directly on the above discussion of Section 2.01: First, that the Shareholders have "*all necessary power and authority… to carry out [their] obligations hereunder….*" ; Second, that the Agreement "*constitutes a valid and binding obligation of such Shareholder, enforceable against it in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general equitable principles….*" In light of this plain language, it is doubtful whether Terra may credibly argue that the laws of Peru or Guatemala may properly be taken into account by a Board member, as a matter of discretion, to oppose Board action to end the Foreign Arbitrations. In Section E below we find that Respondents cannot so limit the measures they are willing to have the Company's Board take to terminate the Foreign Arbitrations

[8] PPT/AMLQ in their Application rely mainly on Section 4.04(a)(viii) of the SHA, which assigns to the Company's Board exclusive authority over commencement of legal proceedings by a Company Subsidiary. But the issues presented by the Application require examination more broadly of the Parties' obligations toward one another, as set forth in their Agreements, with respect to Company Subsidiaries.

34. The governance powers of the Board to deal with the Foreign Arbitrations are not in dispute. The dispute as submitted to us in writing and orally on February 2, 2023 appeared to be over whether this is a circumstance in which the Tribunal may require Terra as a Shareholder and the Terra-appointed Directors on the Board to support a particular Board action proposed by the other Board members – in short, whether Terra's Board members must support replacement of the Manager Claimants in Peru and Guatemala should they maintain their refusal to withdraw the Foreign Arbitrations. However on February 10, 2023, the complexion of this Application changed. As previously noted, on that date, Respondents' counsel notified the Tribunal of Terra's decision to appoint William Mendez Araujo to the Company's Board of Directors in place of Mr. Hernandez. See para. 17 above. Respondents offered no explanation for this change and did not request an opportunity to make submissions on how this change bears on the Application. The change does, however, give us reason to address Respondents' obligations, in regard to the Foreign Arbitrations, more broadly than in terms of the participation of Terra-appointed Directors in Company governance.

35. As to the Company governance powers of the Board, Section 4.04 of the SHA gives the Board power over:

1. (v) "any amendment to … any Company Subsidiary's respective constitutional documents";
2. (vi) "the hiring or firing and compensation of members of the Management Team" which includes the "senior management of the Company Subsidiaries" (see the definitional SHA Art. I, at p. 9)
3. (viii) "the commencement, settlement, payment, discharge or satisfaction of any litigation, claim, liability or obligation … involving … (C) … any Company Subsidiary and any Shareholder or any Affiliate or Related Entity of a Shareholder pursuant to any other agreement, arrangement or transaction"
4. (xiv) "the transfer, in a single transaction or series of transactions, of assets or receivables of … any Company Subsidiary…."

36. In addition Section 4.06 (b) provides: "*Subject to approval by the Board, the Chief Executive Officer of the Company shall nominate the remaining senior managers of the Company and the senior management of the Company Subsidiaries.*"

C.-3. The Development Agreement

37. The Development Agreement, entered into in conjunction with the SHA and the S&C Agreement, is important to the analysis of this Application because it relates directly to the subject matter of the Foreign

Arbitrations and the counterclaims of the Respondents *in this arbitration*, which the Foreign Arbitrations mirror: i.e. the Peppertree-appointed Company Board members' allegedly improper refusals to approve proposals for Tower development advanced by Terra and its Tower-construction affiliate owned and controlled by Jorge Hernandez, DTH.

38. The Development Agreement provides that Terra will submit a "Site Candidate Profile" (SCP) to the Development Committee, and that within two business days "the Development Committee will notify Terra and the relevant subsidiary of DTH whether the Proposed Site will be developed by the Company." (Section 1.1 (c)).

39. The Parties to the Development Agreement are the Company, Terra and DTH. In Section 3.4 of the Development Agreement those Parties agree to resolve "any dispute between or among [them] relating to the terms of this Agreement or the transactions contemplated hereby" pursuant to the arbitration provisions of the SHA, i.e. Section 8.14 and 8.15 "which sections shall be deemed incorporated herein by reference."

40. Further, the Development Agreement is linked to the SHA through Section 4.04(b) of the latter, which provides for the composition of and procedure to be followed by the Development Committee:

> A committee (the "**Development Committee**") shall be established to review and approve the SCP Packages for Tower opportunities presented to the Company pursuant to the Development Agreement. The initial members of the Development Committee will be the Directors. The Board may establish procedures for voting, appointing, removing and replacing additional and/or alternate individuals to the Development Committee. Unless and until the Development Committee establishes a contrary procedure, decisions of the Development Committee will be made by the Board.

D. Relevant Facts Developed in The Proceedings on This Application

D.-1. The Respondents' Role If Any in the Commencement of the Foreign Arbitrations

41. In this Section of our Award we examine what the record reflects about the Parties' factual disputes over (1) Terra's and Mr. Hernandez's alleged involvement in causing the Foreign Arbitrations to be commenced, (2) Terra's and Mr. Hernandez's efforts to cause the Foreign Arbitrations to be withdrawn, and (3) Respondents' contentions that the Foreign Arbitration Claimants are maintaining the Foreign Arbitrations despite knowing that Terra and Mr. Hernandez disapprove and want those arbitrations withdrawn.

42. Three email exchanges summarized below, widely spread over a 12-month period, were combined by Respondents' counsel into a composite exhibit (R-1) to support the proposition that the Manager Claimants had understandable reasons -- of frustration with Tower rejections by the Peppertree Directors -- to take matters into their own hands by filing the Peru and Guatemala Arbitrations. (Resp. Jan. 24 Br. at 2).

43. The first thread in Ex. R-1 is from January 2022. The Manager Claimants — that is, Ms. Merino, Mr. Garzaro and Mr. Ortiz — were passive recipients of an email exchange between Ms. Pineda of DTH and Mr. Rainieri of Peppertree. (Ms. Pineda, we have found in the prior proceedings, was unilaterally installed by Mr. Hernandez to carry out the functions of Company CEO in violation of the Parties' agreement that this was Mr. Gaitán's position and in violation of the SHA in regard to the process for hiring and firing the Executive Team of the Company). The email exchange concerned the "call of funds" for site development in Peru. All members of the Company's Board, the Company's Executive Team, and every attorney appearing in this arbitration was a recipient of this exchange.

44. In Mr. Ranieri's response to Ms. Pineda, he (1) referred to Peppertree's prior rejections of the call of funds for the site developments of the five sites referenced by Ms. Pineda, (2) reiterated those rejections, (3) objected to use of Company funds to develop the rejected sites "until the parties' respective rights relating to this issue have been addressed by the Tribunal in Phase 1."

45. Two further exchanges of emails between Ms. Pineda and Mr. Ranieri are included in composite Exhibit R-1, with nearly identical content and an identical cast of "cc recipients." The first occurred on April 25, 2022 - which was two months after the Tribunal had issued its 1st PFA granting specific performance of Respondents' obligation to join in a sale of the Company. Mr. Ranieri opined that the proposed expenditures for site development were not justified because "[t]he required sale of the Company should be just months away, providing little time for asset appreciation."

46. A third exchange of emails between Ms. Pineda and Mr. Ranieri is also contained in composite exhibit R-1, again in regard to a proposal and rejection of a call of funds for site development. But the dates of this exchange, January 9 and January 15, 2023 skip over an important step in the chronology – to which we now turn.

47. Respondents' Ex. R-2 presents an email from Mr. Garzaro, one of the Peru Arbitration Manager Claimants, dated September 28, 2022, that followed a similar exchange of emails between Ms. Pineda and Mr. Ranieri. Mr. Rainieri's email, like the January and April 2022 emails that preceded it, found in Ex. R-1, concluded with a reservation of rights. Perhaps it was this reservation by Peppertree that served as the context for Mr. Garzaro to write in response: "*I have to let you know that as we reserve the right to initiate legal actions as well. Telecom Business Solution S.R.L. (TBS) is a Peruvian company that performs functions under the strict corporate guidelines and the Peruvian legal framework.*"

48. Our 2d PFA, wherein as a sanction we imposed a stay of proceedings on Respondents' counterclaims pending full compliance with our awards and orders, was delivered August 12, 2022. This email (Ex. R-2) came five weeks later.

49. When the Parties confirmed to us, on January 27, 2023, that there is a disputed issue of material fact about Terra's and Mr. Hernandez's role, if any, in instigating the Foreign Arbitrations, we called for document production by Respondents (PO 2023-02 at para. 12). The start date of the time frame for production was August 16, 2022[9]. So if there were any emails from Respondents or any of their representatives, to the Peru Manager Claimants or their representatives, opposing the issuance of this threat by Mr. Garzaro of local Peru proceedings against Peppertree, or opposing the substance of what Mr. Garzaro threatened, they were within our production order to Respondents.

50. Respondents have not produced a single email expressing Respondents' support for or opposition to the filing of the Foreign Arbitrations. (Putting aside the transmittals of the initial Board resolution calling for withdrawal of the Foreign Arbitrations, discussed in paras. 55-62 below). This is a failure of proof on the Respondents' part. In the context of this Application, considering access to evidence, and our findings in the prior proceedings, and the Manager Claimants' roles in this arbitration as witnesses for Respondents, it was Respondents' burden to provide evidence that explains the origins of the Foreign Arbitrations, or that might explain their lack of access to evidence showing the origins of the Foreign Arbitrations such as evidence that they lack voluntary access to the Company Managers emails and other records. They have failed to present such evidence.

[9] This date was a minor error in our recalling of the date of the 2d PFA.

51. That the Respondents' ultimate objective is the prolongation of the Foreign Arbitrations and not their prompt withdrawal was strongly denied by Respondents in their written submissions of January 24, 2023 and thereafter, and in the oral hearing held on February 2. But in assessing Respondents' objectives as channeled through the arguments of its counsel, we also need to take into account how counsel first addressed us on this matter in an email on January 4, 2023 after we were first informed of the Peru arbitration filing by the Company's counsel.

52. Respondents' counsel wrote to us on January 4 that any involvement of the Tribunal was "*an unnecessary waste of resources, since the Peruvian arbitration falls outside the scope of this arbitration....*" That was an untenable characterization of the Peru Demand for Arbitration that had been filed on December 28, 2022. That arbitration, and the one filed in Guatemala a few weeks later, objectively in the legal effects are -- without regard to who instigated them -- attacks on both of our prior awards. As we explain further below in paras. 98-101, the Foreign Arbitrations obstruct the Parties' ability to effectuate our 1st PFA because the Foreign Arbitrations impair prospects for sale of the Company. They also constitute a collateral attack on our 2d PFA because the Tower Rejection Breach counterclaim might be arbitrated piecemeal, potentially country by country across the eight countries of the Company's territory, in defiance of our stay of proceedings on those very claims and the compliance conditions we have established for lifting that stay (paras. 102-105 below).

53. Respondents' counsel went on to state in his January 4 email to us that"*[t]he Company and its shareholders should be focused on dealing with the Peruvian arbitration in Peru - not before this tribunal.*" In insisting upon "*the limited scope of this arbitration,*" Respondents' counsel did not acknowledge that this arbitration already included, since its earliest days in 2021, Terra's counterclaims asserted derivatively on behalf of the Company asking for $186 million in damages against Claimants arising from the Peppertree-appointed Directors' refusal to support Tower site development, in Peru and throughout the Territory. Had it been Respondents' intention, at that point, to shut down the Peruvian arbitration, one rational first response would have been a letter to the Peru Chamber of Commerce Arbitration Center reporting that the Claims were already submitted to arbitration before this Tribunal, that no arbitration agreement existed between the FACCs and Manager Claimants, on the one hand, and the Company and PPT/AMLQ on the other, and that the Peru Arbitration Center should take no steps to form a Tribunal. But Respondents did not draft or propose such a letter. They proposed that the Company and PPT/AMLQ gear

up to defend the Peru arbitration by hiring counsel – itself an obviously fraught issue because of the disputes among the Shareholders. Another straightforward first response would have been for Mr. Hernandez to instruct the Manager Claimants to withdraw the arbitrations, or else lose their DTH jobs and incomes. Instead, a purported *ex parte* interim measure from a Peru court conveniently surfaced a week later, purportedly applied for by the Peru Manager Claimants, purporting to enjoin the Company from taking any such steps. (*See* paras. 80-84 concerning that purported injunction).

54. The actions and inactions of Respondents in early January send quite a different message from their subsequent insistence that their actions have been directed toward securing the withdrawal of the Foreign Arbitrations.

55. The explanation for Respondents' shift in approach is evident in retrospect. The Respondents' strategy of faulting insubordinate local managers had not yet emerged on January 4. It only emerged three days later (Ex. R-7), on January 7th, when Mr. Hernandez personally sent an email to his fellow Board members transmitting a proposed Board resolution that he had already signed, and accompanied the transmission with an email that said "*I highly recommend we find out what is happening to management in Peru and why they have decided to act the way they have.*" The Tribunal does not believe that Mr. Hernandez needed to enlist the Peppertree Board members to have the ability to find out "*what is happening to management in Peru*" either on January 7, or, indeed, when Mr. Garzaro threatened local legal proceedings against Peppertree on September 28, 2022 (Ex. R- 2)[10] and Mr. Hernandez apparently issued no recorded reply. Within DTH, those Company Managers report directly to Mr. Hernandez and he could contact them immediately and demand answers.

56. The Respondents have not disputed Claimants' contentions that the Manager Claimants are hand-picked by Mr. Hernandez. This is corroborated by evidence submitted by Respondents. Ex. R-22 is the notarial certificate in Guatemala whereby the notary confirms Mr. Ortiz's authority to act as Manager for the Guatemala Company Subsidiary. The notary on that occasion in 2016 is one of the counsel for Respondents in this arbitration, Carlos Ortega of the Mayora e Mayora firm. Mr. Ortega was mentioned in our 2d PFA because he initiated Respondents' contact with the Morrison & Foerster firm to obtain the

[10] Coincidentally or not, this was the very same day that Mr. Hernandez and Mr. Mendez Araujo were conducting a coercive search of Mr. Gaitán's computers, office and personal vehicle in Guatemala City, gathering evidence that they would later use to falsely portray Mr. Gaitán as a criminal in complaints filed in a Guatemala court. See para. 17 above.

Morrison & Foerster Memorandum that became the subject of extensive proceedings summarized in that Award). (2d PFA at paras. 90-102, mentioning Mr. Ortega at paras. 90 and 93).

57. The evidence of Respondents' control over the Manager Claimants is considerable, while the evidence that they are acting without Respondents' blessing here is almost nil. Respondents have not disputed that Mr. Hernandez has the sole discretion to terminate the Manager Claimants from their non-Company positions at DTH. And the Manager Claimants provided evidence in this arbitration – extensive written witness statements that argued the merits of Terra's Tower Rejection breach counterclaims in support of Terra's position on those claims (PPT-AMLQ Exs. K, L, and S), at times when those issues were not actively the subject of our proceedings. Also, the Manager Claimants were in the forefront of Respondents' failed effort, before the Company's Board and in turn before the Tribunal, to justify disobedience to our Interim Relief Orders on the basis that Mr. Gaitán's alleged misconduct was a compliance risk to the Company (PPT/AMLQ Exs. M, N, O).

58. From the prior proceedings, there is more evidence of Respondents' willingness to act unilaterally in regard to the employment status of Company Subsidiary Managers. In 2021-22, when Mr. Hernandez purportedly became displeased with a different Company Subsidiary Manager, Mr. Gaitán's father in El Salvador, allegedly due to embezzlement of funds, he did not hesitate to replace him unilaterally without asking the other shareholders to join him to "find out what is happening to management." This Tribunal had a lengthy evidentiary process in 2022, and the evidence received, which Respondents elected not to contradict, showed that Mr. Hernandez brought about the dismissal of Mr. Gaitán's father as Company Subsidiary Manager in El Salvador in 2022 on the basis of accusations of fraud and embezzlement and other personal impropriety that had no factual basis. (See 2d PFA at paras. 55-61, 77).

59. Two days after Mr. Hernandez's January 7, 2023 "*find out what is happening*" e-mail, on January 9, 2023 a Washington, DC lawyer named Claiborne W. Porter, evidently acting for Respondents, sent an email to Claimants' counsel. It was introduced as Respondents' Ex. R-8 on January 24, 2023 and it reads as follows: "*Hi Mike and Gregg. We are reaching out to you as a matter of urgency. Given the exigency of the Peru arbitration - I believe the company must respond by January 11 - we are asking whether your clients are going to sign our proposed board resolution. Please advise as soon as possible.*"

60. Below this email in Ex. R-8 appears extensive redaction. The redacted matter, it turns out, was another email from Mr. Porter to Claimants' counsel Mr. Ungar, on January 8, 2023, a Sunday, saying in part: "*Per my text, I have attached the Board resolution Jorge sent.*" This was presented by Respondents on January 27 as Ex. R-14.

61. Respondents presented as Ex. R-10 another email from Mr. Porter, sent on Saturday afternoon January 14 to Company counsel Adam Schachter with copies to PPT/AMLQ's and Respondents' arbitration Counsel, stating in pertinent part: "*We learned from Sagastume that CT was noticed for arbitration in Guatemala by management.*" Mr. Sagastume is the second Terra-appointed member of the Company's Board.

62. These emails in turn factor importantly in our findings regarding Mr. Hernandez's role in the Foreign Arbitrations. It is inferable that Mr. Porter played some role in the genesis of Mr. Hernandez's Board resolution proposal of January 7. It is also inferable that Mr. Sagastume may have had knowledge about the genesis of the Guatemala arbitration. After we directed Respondents in PO 2023-02 to produce documents about the Foreign Arbitrations including those to or from "representatives," Respondents' lead counsel Mr. Smith in a January 31, 2023 email to the Tribunal requested an extension of time to comply with the production order, stating that this was needed to enable an ESI specialist to complete the required search; and his email provided a short list of "representatives" whose emails would be searched – a short list that included <u>no attorneys</u>.

63. In the Tribunal's response to Mr. Smith on February 1, we made it clear that "representatives" included attorneys and that any privileged documents should be identified in a privilege log that the Tribunal had already acknowledged might be necessary. The Tribunal did not grant Respondents' request for an extension of time, stating that it had not been shown why the process of identifying responsive documents required an ESI specialist's search.[11] But neither did we close the door to supplementation of the small

[11] Respondents' counsel's explanation at the February 2 hearing that an e-discovery vendor's services were necessary because the Tribunal would likely not credit the results of an informal search process is fair only to the extent that the Tribunal might be skeptical of inferences Respondents might seek to have us draw in their favor based on an absence or paucity of responsive documents following a diligent search. But in this case it is Claimants whose interests are advanced by an absence of responsive documents, and Respondents are readily in a position to rebut any such conclusion by producing even a handful of contemporaneous emails, texts or other messages in which Mr. Hernandez expressed opposition, in words or substance, to the Manager Claimants' consideration or initiation of their foreign arbitration proceedings. An informal search would be sufficient to identify at least some such messages if any existed.

number of emails (several of which were already in the record) produced 30 minutes before the February 2 oral hearing.[12]

64. At the close of the oral argument hearing on February 2, we directed both Parties that adding evidence to the record on this application would only be permitted upon leave obtained for good cause. When Respondents sought such leave on February 6, they did not explain the scope of their ESI specialist's work; they said nothing about what searches had been done to find communications to and from lawyers, or to and from Mr. Sagastume; and they tendered no privilege log. For these reasons, we did not grant Respondents' motion for leave to supplement.

65. Respondents' failure to produce more than a handful of documents, and any relevant documents other than ones already provided to Claimants, is a source of concern. It seems likely that there are one or more emails to and/or from Mr. Porter that pertain to the Foreign Arbitrations, other than those sent to PPT/AMLQ that we have seen. It would be odd indeed for any of Respondents' counsel to contact opposing counsel about a matter such as the Foreign Arbitrations without having first communicated with the client.[13] It also seems likely that Mr. Sagastume has emails about at least the Guatemala arbitration. Possibly certain of these emails would be subject to a privilege claim. But we received no privilege log. And despite our specific directions that the emails of counsel be searched, there was no representation made to us that this was done.

66. No emails or other communications about the Foreign Arbitrations between or among Respondents and the Manager Claimants (or their respective counsel) were produced by Respondents. We find it wholly implausible that these Foreign Arbitrations originated, and have subsisted for several weeks, without there being any such communications (save for the exceptions now mentioned). But among the handful of documents provided untimely by Respondents 30 minutes before the February 2 oral hearing was an email from one of Terra's in-house lawyers, Ms. Kirby, to the Manager Claimants on February 1, 2023 informing them of our document production request in PO 2023-02 (but without transmitting the Order

[12] On February 6, 2023, Respondents moved for leave to supplement the record with a small batch of emails derived from the ostensibly completed ESI search. Whereas Respondents stated that nearly all of emails found were already in Claimants' possession, and the others were not relevant, and whereas the motion made no representations about the scope of the search effort, we did not grant that application.

[13] On February 6, 2023, Mr. Porter entered his appearance in this arbitration as one of counsel of record for the Respondents.

or that excerpt of it). Another of the documents Respondents produced was a reply from Mr. Garzaro to Ms. Kirby, also on February 1, in which he asserted: "*Given that we are not parties to the US arbitration nor are we managers or representatives of any of the Respondents, we are not bound by paragraph 12 of the said order.*"

67. We make several observations.

68. First, it was established in our 2d PFA after an extensive evidentiary proceeding that when Mr. Hernandez wanted documents from the computers used by Mr. Gaitán, Ms. Echeverría and others who he perceived to be aligned with them — that is to say, who he perceived to be aligned against him in regard to this arbitration — he called them to a meeting with him in Guatemala City on short notice, flew to Guatemala City to attend the meeting, and prevented them from leaving a conference room until they had turned over the computers they used to Mr. Hernandez's IT assistant for purposes of copying their hard drives. This was, according to the evidence, under threat of physical force because armed security guards were present on the premises and they were under the direction of Mr. Hernandez. Mr. Hernandez, we found based on the evidence, had gone so far as to insist on a search of Mr. Gaitán's car and Mr. Gaitán's office by Mr. Hernandez's lawyers – including Mr. Mendez Araujo just now appointed to replace Mr. Hernandez on the Company's Board -- to determine if Mr. Gaitán had removed anything from the premises. And the fact that Mr. Gaitán had stolen nothing, as the search of his car and office had confirmed, did not deter Mr. Hernandez from causing the filing of criminal charges against Mr. Gaitán in a Guatemala court accusing him of theft. (2d PFA paras. 63-69, 78)

69. Second, we sent PO 2023-02 at 5 pm on January 29, 2023 and Respondents' counsel knew our deadline for production was February 1, 2023 at 6 pm. There is no evidence provided or even a representation from Respondents' counsel that even begins to justify having a search for the responsive documents in the possession of the Manager Claimants begin with Ms. Kirby's email sent at 1:42 a.m. on February 1.

70. Third, from the evidence before us, it is clear that at least two people in Respondents' camp know the origins of the Board resolution proposed by Mr. Hernandez on January 7: Mr. Hernandez and Mr. Porter. That is to say, those individuals possess evidence, electronic or otherwise, that would answer the disputed fact question of whether that Board resolution reflects an authentic commitment of Respondents to terminate an unauthorized foreign arbitration, or an orchestrated ruse to make it appear so. Invited to

produce evidence by our Procedural Order No. 2023-01 of January 25, 2023, Respondents declined, saying the burden of proof was on Claimants. Ordered to produce evidence in Procedural Order No. 2023-02 as clarified in Procedural Order 2023-03 and in our emailed guidance on February 1, 2023, they failed to comply.

71. The foregoing facts amply support an adverse inference, which we draw, that Respondents supported, if not instigated, the Foreign Arbitrations.

72. Further, just as Respondents on September 28, 2022 did not respond in opposition to Mr. Garzaro's threat of local legal proceedings against Peppertree in Peru (Ex. R-2), no evidence is presented of any response by Respondents to Mr. Garzaro's patently untenable and seemingly insubordinate insistence in his February 1, 2023 email that our orders for document production do not bind the FACCs and the Manager Claimants. That our orders directing conduct by DTH make DTH legally responsible for non-compliance by DTH subsidiaries, affiliates and employees was determined in this arbitration in our interim measures orders of November 2021 and March 2022, and was incorporated in our 2d PFA.

73. Equally here, DTH and its sole shareholder Mr. Hernandez are legally responsible for the Manager Claimants' resistance to our document production orders, and for Respondents' decision to suffer them to respond in this fashion rather than, if necessary, sequester and copy their email servers which based on evidence in this arbitration discussed above, are surely Company property. The Manager Claimants' resistance and Respondents' acquiescence in it seem to be aligned with the position taken by Respondents in the proceedings leading to our 2d PFA, i.e. that our Tribunal lacks power to command any conduct by affiliates of DTH and their employees. But that Award remains in full force and effect so today our prior rulings on DTH's and Mr. Hernandez's responsibility for the conduct of DTH employees, affiliates and employees control in proceedings before us.

74. Also, Respondents produced on February 1 an email from Mr. Garzaro to the Board members that was copied to every attorney appearing in this arbitration, dated February 1, 2023 at 2:31 a.m. In that email, Mr. Garzaro asserts that Claimants' allegation that the Peru arbitration was instigated by Mr. Hernandez is "*baseless*" and then states: "*We have no knowledge of your dispute in the US*" (an assertion that at odds with the fact that Mr. Garzaro and Ms. Merino and Mr. Ortiz submitted extensive written testimony in this arbitration).

75. As to allocation of burden of proof on disputed fact issues in an international arbitration, this is within the sound discretion of the Tribunal. The specific context reasonably affects that allocation, and here where the applicant seeking urgent interim relief cannot reasonably avail itself of the disclosure procedures that the Commercial Rules provide, we find it appropriate to allocate the burden to the party that has custody and control of the pertinent evidence, Respondents. We also find that Claimants shifted the burden of proof to Respondents on the disputed fact issue of Respondents' support for the Foreign Arbitrations by presenting evidence of (1) Respondents' and especially Mr. Hernandez's ability to direct and control, and indeed to dictate through intimidation, the conduct of the Manager Claimants and other employees of DTH and its affiliates and to act unilaterally to affect their status adversely upon only his own whim and preference, and (2) the prior written testimony in this arbitration in support of Respondents' positions including but not limited to the Tower Rejection Breach counterclaim by the Manager Claimants: Ms. Merino and Messrs. Garzaro and Ortiz.

76. Our allocation of the burden of proof, as well as our ultimate determination, is reinforced by the fact that Respondents' principal defense in this proceeding to Claimants' allegation that they supported the Foreign Arbitrations is -- apart from having no burden to disprove such allegations -- that Respondents not only had no motive to support the Foreign Arbitrations but that such proceedings were inimical to Respondents' interests. Yet Claimants pointed out convincingly that the pendency of the Foreign Arbitrations actually serves Respondents' longstanding opposition to the sale of the Company by thwarting the interest of prospective buyers in considering an acquisition of the Company, and by countermanding the effectiveness of our stay of proceedings on Respondents' counterclaims and the potential coercive effect of that stay in potentially causing Respondents to comply with our November 2021 and March 2022 Orders. (Feb. 2, 2023 Hearing Tr. at 40-41)

77. Respondents, in full control over evidence of their own conduct, therefore had the burden of proof on this disputed issue of fact, and they failed to sustain it. An email such as that created by Mr. Garzaro on February 1, 2023 does not sustain Respondents' burden of proof. It only serves to aggravate and deepen the dispute over whether Mr. Garzaro writes such emails in service to Mr. Hernandez. The same can be said of Mr. Garzaro's and Ms. Merino's correspondence dated January 13, 2023 (PPT/AMLQ Ex. B) sent to Peppertree counsel in Peru wherein they asserted that they were unable to confirm the authenticity of the Board resolution initiated by and signed by Mr. Hernandez, and their refusal to heed that resolution

even after emails from Mr. Rainieri and Mr. Hernandez on January 25, 2023 (produced by Respondents) confirmed its authenticity.

78. Therefore, based on the combination of adverse inference and failure to satisfy the burden of proof, upon Claimants' evidence, and upon Respondents' opposition to the relief sought by Claimants premised on several highly technical and unpersuasive grounds, we find as facts: (1) that Respondents at a minimum have supported the Foreign Arbitrations, and (2) that Respondents' proffer of a Board resolution purporting to seek dismissal of the Foreign Arbitrations was a pretense to mask their ongoing support for the Foreign Arbitrations.

79. It follows from these findings of fact that Respondents' legal arguments that interim relief is unnecessary because the Board should be left to determine how to respond to the Foreign Arbitrations cannot be accepted. The Terra-appointed members of the Board have not acted in good faith, and this justifies the Tribunal's intervention to require conduct that is not only in conformity with the express provisions of the SHA but also with the duty of good faith. On the record before us, the incoming Terra Board member, Mr. Mendez Araujo, is and in the course of this arbitration has been Mr. Hernandez's agent.

D.-2. The Peru Injunction Orders

80. The Parties in initial submissions made reference to an *ex parte* injunction order said to have been entered by a judge in Lima, Peru, upon the application of the Peru Manager Claimants. Neither party initially submitted the purported orders, and upon the request of the Tribunal the Respondents did submit them. What was submitted (as understood from the English translations submitted) appears in form to be two effectively identical purported injunction orders, so-called "precautionary measures," which may have been issued on January 12, 2023 by Judge Juan Gustavo Vasillas Solano of the Seventh Civil and Commercial Court in Lima. The Orders purport to direct the Company not to alter the status and ["ordinary and natural"] powers of Ms. Merino and Mr. Garzaro as Managers of the Peru Company Subsidiaries, for the duration of the Peru Arbitration. However the Orders bear no manual signature of the identified judge or any other officer of the Court. The translated documents bear indications that a digital signature may have been given by someone, but this is unclear – both as to the presence of a digital signature of a Judge and as to the effect if any of a digital signature in the issuing court.

81. Despite our Tribunal having ordered both Parties to obtain and provide duly authenticated copies of the Orders together with certified translations, and our guidance that on the question of whether the orders are self-authenticating we would be guided by Federal Rule of Evidence 903(b), the Parties have not complied but have instead merely provided the representations of their respective counsel, on what basis we do not know, that these Orders were in fact entered by a Judge in Peru. We have an email so stating from Respondents' counsel Mr. Smith on January 30, 2023, and an email from Claimants' counsel Mr. Djordjevic so indicating on January 31, 2023. Neither of these emails was a formal attestation. The Parties via these emails may be seen to have stipulated that they do not to contest the authenticity of the Orders. But whether there is any such stipulation is unclear to us, especially because in the oral hearing on February 2, 2023 Respondents' counsel did not place any reliance on the purported orders, a stance that was in contrast to Respondents' prior written submissions.

82. Our concerns about the authenticity of the Orders (in particular whether they are, rather, proposed Orders in the electronic file of the Court that still await the imprimatur of a Judge) were intensified upon receipt of a written opinion about the process applicable to service of the Orders, authored by the Peruvian co-counsel for the Company designated by Respondents, dated February 1, 2023 and submitted as evidence by Respondents on that date. (Ex. R-27). According to that opinion, there are three possible methods for service abroad on the Company, as a British Virgin Islands company:

> 1. The Company may unilaterally decide to appear before the judge, and request to be notified with the injunction order at a Peruvian address.
> 2. The Judge could send a formal notification from Peru to the legal address of the Company in British Virgin Islands with the Injunction Order.
> 3. Once the arbitration tribunal is installed in the proceeding initiated by the Peruvian Subsidiaries and the Managers, the Tribunal will serve the injunction order by email to the Company, as this is a formal notification toll according to the arbitration rules.

(Ex. R-27 at p. 7).

83. Evidently no Judge in the Peru court has sent a formal notification to the Company in the BVI, as the Company or the Parties would have notified the Tribunal if this had occurred. And transmission of the Orders in the first instance by the Peru Arbitral Tribunal once it is fully constituted seems antithetical to the time-sensitive interim relief purportedly given by these Orders, *i.e.* to forbid the immediate termination of the Manager Claimants in Peru from their Manager positions. If the Judge intended the Orders to have the immediate and urgent effect that is recited in the Orders, it would make no sense to

allow a gap period of indefinite duration, before the Tribunal is constituted, in which the Company and/or DTH could terminate the employment of, or change the responsibilities of, the Manager Claimants. What is more, the Orders as rendered in English call for a different method of service entirely, i.e. "by international warrant." This raises a question not only because it is not mentioned as a permitted method of service in the opinion of Peruvian counsel tendered by Respondents, but also because Peru is not, so far as we can discern, a Party to the Hague Service Convention. (www.Travel.State.Gov/Legal Resources/Judicial Assistance Country Information/Peru Judicial Assistance Information, last visited February 7, 2023). Further, the US State Department online resource just cited reports that Peru is a party to the Hague Apostille Convention and that "Peru's competent authority for the Hague Apostille Convention will authenticate Peruvian public documents with Apostilles." (Id.) But neither Party submits that this has been done, or that they even attempted it. Further, neither Party submits any evidence that the purported Orders have been served in any fashion that any interested party contends constitutes valid and effective service.

84. The Tribunal reaches no conclusions about the authenticity of the Orders. In the oral argument on February 2, 2023, they were not relied upon by Respondents as a basis to argue that potential violation of the Orders should be a factor for Company Board members to consider in deciding whether to remove the Manager Claimants in Peru from their positions and replace them with new Managers who would withdraw the Peru Arbitrations, or relieve them of responsibilities in regard to the commencement and pursuit of legal proceedings. This, together with the undisputed fact that the purported Orders have not been served, supports our determination that the purported Orders play no role in our consideration of PPT/AMLQ's interim relief application. We also note that the Orders were obtained – assuming they were – in an exclusively *ex parte* process in which the Company and Claimants were neither given notice nor an opportunity to be heard. Respondents asserted in their January 30, 2023 submission that in the accompanying opinion of their engaged Peruvian co-counsel for the Company (Ex. R-27) it would risk acceptance of service of the injunction order to ask the Court for a certified copy. But in fact this assertion cannot be found in Ex. R-27. Not only do Respondents cite an opinion of Peruvian counsel for a statement they did not make, but they offer no account of their failure to use the facility for authentication offered pursuant to the Hague Apostille Convention. Our doubts about the authenticity of the purported injunction orders are increased as a consequence.

E. Legal Analysis

E.-1. Applicable Legal Standards

85. Rule R-37 of the AAA Commercial Arbitration Rules states in pertinent part:

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

86. Further, whereas interim measures are a form of remedy or relief, Rule R-47(a) is also relevant. It provides that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including but not limited to, specific performance of a contract."

87. We should be clear, however, about how we interpret Rule R-37's requirement that interim relief should be "necessary." Implicit in that phrase, when the Rule is applied in an international arbitration, is a requirement that the measure should be necessary to avoid an injury to the applicant that is "not adequately reparable by an award of damages" and that such injury "substantially outweighs the harm" to the party against whom the measure is directed. *See* UNCITRAL Model Law on International Commercial Arbitration Art. 17A sub-section (1)(a); *see also* M.J. Goldstein, *A Glance Into History for the Emergency Arbitrator*, 40 Fordham Int'l L.J.779 (2017).

88. It follows logically that we also adopt the Model Law's criterion that the applicant for interim relief should demonstrate "a reasonable possibility that the requesting party will succeed on the merits of the claim." Whereas the interim measures sought by PPT/AMLQ are in aid of the effectiveness of relief we have already given, i.e. the 1st and 2d PFAs, rather than new relief PPT/AMLQ seeks, we consider that this criterion has clearly been satisfied. Stated differently, insofar as the interim relief relates to the prospects for a sale of the Company, PPT/AMLQ already prevailed on the issue of whether the Company must be sold, in our 1st PFA. Insofar as the interim relief seeks to require arbitration of the Respondents' counterclaims in this arbitration, Respondents' stated position is that they agree.

89. Where the Parties' arbitration agreements provide a standard applicable to the issuance of interim measures by arbitrators, arbitrators have the power to grant interim measures according to those standards even if the selected form of interim relief could not be given directly by a court under the law governing provisional relief in that court. *See* CE Int'l Resources Holdings LLC v. S.A. Minerals Ltd. Partnership, 2012 WL 6178236 at **3-5 (S.D.N.Y. Dec. 10, 2012). That is not to say, however, that our

discretion in deciding whether to grant an anti-arbitration injunction, or relief that will accomplish it, should not be informed by the principles courts would apply if measures had been requested in the courts. The measures we adopt today are fully consistent with New York arbitration law.

90. Under the arbitration law of New York, "[a] party seeking to enforce a valid agreement to arbitrate in New York under CPLR 7503(a) is entitled to injunctive relief against further prosecution of proceedings in tribunals of other jurisdictions concerning matters within the scope of the arbitration agreement." In the Matter of PriceWaterhouseCoopers, LLP v. Cahill, 205 A.D.3d 463,464 (1st Dep't 2022). *Cahill* is in a direct line of consistent New York arbitration jurisprudence from a case cited here by PPT/AMLQ and Respondents, Curtis, Mallet-Prevost, Colt & Mosle, LLP v. Garza-Morales, 308 A.D.2d 261, 263 (1st Dep't 2003), where the Appellate Division invoked "*the long-settled principle that a party seeking to enforce a valid agreement to arbitrate in New York under CPLR 7503(b) is entitled, as a matter of course, to injunctive relief against further prosecution of proceedings in other jurisdictions concerning matters within the scope of the arbitration agreement.*" (emphasis supplied).

91. The First Department in both cases, *Curtis* and *Cahill,* cited S.M. Wolff Co. v. Tulkoff, 9 N.Y.2d 356 (1964), where the New York Court of Appeals held that the forerunner of CPLR 7503, section 1451 of the Civil Practice Act, authorized a stay of proceedings brought before a federal agency outside New York in violation of an arbitration agreement providing for arbitration in New York. The State's highest court stated in pertinent part:

> [T]he courts of this State possess the power to stay proceedings wherever they may be pending. Had it been the design of our Legislature to limit the stay, as urged by the respondents, words were at hand to reflect that design. . . . To deny to our courts the power to grant specific performance of an arbitration clause by enjoining the prosecution of foreign proceedings would be a step backward. It would partially re-establish the long-abandoned doctrine that an agreement to arbitrate is revocable. We may not and should not take such a step unless expressly directed to do so by the Legislature.

9 N.Y.2d at 361-62.

92. Had the interim relief sought by PPT/AMLQ here been sought in the first instance from a court applying New York law, an argument might perhaps have been made that the court's power to stay prosecution of foreign proceedings under this case law is exercisable only in conjunction with a motion to compel arbitration. But that possible limitation does not affect us, because our powers to grant interim relief are

governed by the Parties' arbitration agreements, and in turn by Rules R-37 and R-47(a) of the AAA Commercial Arbitration Rules. *See* CE Int'l Resources Holdings, *supra*.

93. It is within our discretion, applying those arbitration rules, to conclude that the anti-suit injunction powers New York courts may exercise in support of enforcing an arbitration agreement providing for arbitration in New York under New York law are an appropriate frame of reference for the exercise of anti-suit injunction powers by New York-seated international arbitrators when confronted with collateral attacks upon and obstruction of the effectiveness of their own prior awards and orders that they made pursuant arbitration agreements providing for arbitration in New York under New York law.

94. Respondents urge us to be guided by the principles federal courts apply when considering whether to grant a foreign anti-suit injunction in a non-arbitration context, cases such as China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987) and Paramedics Electromedicina Comercial, Ltda v. GE Medical Systems Information Technologies, Inc., 369 F.3d 645 (2d Cir. 2004). (Respondents' Feb. 1, 2023 Br. at 4-6). (Indeed, the Tribunal brought those cases to the Parties' attention, to invite their comments on the federal anti-suit injunction case law, in PO 2023-02.) Under these cases, Respondents contend, the first requirement for an antisuit injunction is that the parties should be the same before the enjoining court and the court in which prosecution is to be enjoined. Respondents contend that this requirement is not met here because the FACCs and Manager Claimants are not parties to this case, and that our analysis should stop there with a finding that the first "requirement" for an antisuit injunction is not met.

96. But the *Paramedics* case, as Claimants have observed (February 2, 2023 Tr. at 81), interpreted the *China Trade* requirement of party identity to be satisfied where there is "*sufficient[] similar[ity]*." *Paramedics*, 369 F.3d at 652. And indeed in a recent case, a federal district court in the Southern District of New York observed that "[d]*ecisions interpreting China Trade have held that … the parties need not be identical in both matters, so long as the real parties in interest are the same. … Here, the parties to the two actions are … sufficiently similar to satisfy the first threshold requirement of China Trade because Banamex is a wholly-owned indirect subsidiary of Citigroup.*" Citigroup, Inc. v. Sayeg, 2022 WL 179203 at **8-9 (S.D.N.Y. Jan. 20, 2022) (internal citations and quotation marks omitted). [14]

[14] Neither party has cited this case. While this might be a discretionary reason for the Tribunal not to rely on it, or to give the Parties an opportunity to comment before we cite it, that is not necessary here, because this is an urgent interim relief context and also because we sent the Parties in the direction of the *Citigroup* case. In Procedural Order No. 2023-02, we directed the Parties to identify and consider relevant progeny of the *Paramedics* case, of which this *Citigroup* case is surely one and perhaps the most recent one.

96. In the Tribunal's analysis below, we address Respondents' contentions that the Parties in the Foreign Arbitrations are not entirely the same as the Parties to this arbitration, even though the FACCs are indirect wholly-owned subsidiaries of the Company and the Manager Claimants serve with the Company's approval. But we will engage in that analysis mainly to address Respondents' contentions, under the (counterfactual) hypothesis that we considered federal anti-suit injunction standards generally, rather than New York anti-suit injunction standards in relation to a New York arbitration, to provide the most suitable guidance.

97. However we are considerably more influenced by the New York case law discussed in paras. 90-91 above. That case law more precisely captures how a Tribunal asked to give effect to an arbitration agreement providing for arbitration in New York under New York law should treat foreign proceedings that undermine New York's pro-arbitration policy, the arbitration agreements at stake, and the outcomes in those arbitrations.[15] And that case law, as we find it, does not make the availability of an anti-suit injunction depend on the *China Trade* factors being met. The New York cases are focused on the commonality of the subject matter between the foreign proceedings and the New York arbitration that the parties agreed to.

E.-2. Application of the Standards

E.-2.1 *Obstruction of PFA 1 as Irreparable Injury*

98. PPT/AMLQ contend that they are irreparably harmed by the pendency of the Foreign Arbitrations and the threat of additional Foreign Arbitrations, because prospective purchasers of the Company, which our now-confirmed 1st PFA ordered to be sold, would be discouraged from bidding by these manifestations of internal dissension among the Shareholders and between the Company and its local operating subsidiaries. Respondents do not disagree. Their submission is that it is for the Board not the Tribunal to find a path to the termination of the Foreign Arbitrations.

99. We find PPT/AMLQ's contention to have merit. In the 1st PFA we found as a basis for granting specific performance for the Company to be sold (in the manner specified in the SHA) that money damages were not an adequate remedy, and we declined to accept Respondents' contentions that money damages

[15] Other than the *Curtis* case, the New York anti-suit injunction cases cited in Respondents' January 24, 2023 submission do not concern injunctions sought to protect the movant's choice to arbitrate in New York, and so we do not find them to furnish suitable guidance for our decision.

would be an adequate remedy. The impairment of an equitable remedy already granted in an Award – here, an interference with the effectiveness of the Company Sale remedy, by harming both the prospects of a sale, and the price obtainable, in ways that cannot be adequately measured – is itself an injury not adequately reparable by money damages.

100. Common business sense tells us that potential bidders for the Company will shy away because they cannot evaluate the impairment of the Company's operations resulting from the current state of affairs at the local level in Peru and Guatemala (and potentially elsewhere). A buyer might reasonably wonder if the buyer can effectively acquire the operations at those local levels, and whether enforceable general releases can be obtained from Respondents, from the FACCs and other Company Subsidiaries, and from the Manager Claimants and other Company Subsidiary Managers. In short, if clear title and clear control, without post-acquisition liability risk, cannot be obtained by a simple negotiation through an investment bank acting jointly on behalf of all the Shareholders, why should an interested buyer continue to be interested?

101. We are in no position to measure this harm *accurately* in money terms. We observed in the 1st PFA that we might eventually need to address a claim from Claimants to substitute a sum of money for the sale of the Company if the Company cannot be sold, or to award some money damages if there is a sale but at a price lower than what PPT/AMLQ contend would have been achieved in 2021 had there not been disputes and arbitration and the type of internal discord that have marked the period 2021 to date as described in detail in the 2d PFA. But as we observed in the 1st PFA, the fact that we might be forced to put a value on this loss does not make money damages *adequate*, but only potentially necessary.

E.-2.2 *Collateral Attack on PFA 2 as Irreparable Injury*

102. In the 2d PFA we imposed a sanction upon Respondents under AAA Rule R-58, for their non-compliance with several of our orders, that imposed a stay of proceedings on Respondents' counterclaims that would be lifted only upon full compliance by Respondents with all of our orders and awards with which they had not yet complied. At this time, it appears Respondents do not intend to comply. They have filed a Notice of Appeal from the federal court judgment confirming the 1st PFA. They are pursuing a petition to vacate the 2d PFA. They also maintain their separate action in the Southern District of New York for a judgment that would disband and require the replacement of this Tribunal on the basis that we are too biased against Respondents to be allowed to continue.

103. If interim relief is not granted to bring about termination of the Foreign Arbitrations without any proceedings taking place in those arbitrations, there is a substantial risk of impairment of the effectiveness of the stay of proceedings on Respondents' counterclaims that we have imposed in the 2nd PFA, a substantial risk that the pending confirmation and vacatur applications in the Southern District of New York cease to be the exclusive means to challenge that aspect of the 2d PFA, and that a judgment confirming the 2d PFA would not halt the Foreign Arbitrations.

104. Moreover, steps in the Foreign Arbitrations that are well short of final awards on the merits inevitably create harm not adequately reparable by money damages. Claimants and Respondents agreed to arbitrate disputes with one another under AAA Commercial Rules before a Tribunal selected pursuant to those rules, at a New York seat of arbitration, in English, with New York law as the governing law. The fact that the elements of such agreements have value for which money is no substitute is reflected in the fact that the Federal Arbitration Act, the New York CPLR Article 75, the 1958 UN Convention on the Recognition of Foreign Arbitral Awards (New York Convention) and the 1975 Inter-American Convention on Commercial Arbitration (Panama Convention) call for such agreements to be specifically enforced by courts and for courts to stay or dismiss litigation in contravention of such agreements. The carving of Respondents' counterclaims here into country-by-country arbitrations at the Company Subsidiary level deprives Claimants of rights clearly protected by the arbitration agreements in the SHA, the Development Agreement and the S&C Agreement, for which the New York and Panama Conventions, the FAA and Article 75 of the CPLR stand as clear evidence that money damages are not an adequate substitute for specific enforcement of such agreements.

105. Further, the Parties agreed that "the arbitration award … shall be final and binding on the parties." (SHA Section 8.15). By agreeing to binding arbitration in New York, the Parties agreed that vacatur of an award by a state or federal court in New York applying the FAA and the New York and/or Panama Conventions would be the sole form of recourse against a binding arbitration award. Arbitrating Respondents' counterclaims by subdividing them into multiple country-by-country pieces, and making the country-level operating subsidiaries and their managers the nominal claimants, and invoking arbitration clauses calling for arbitration under different rules and different laws and in a different language, when our 2d PFA stays those counterclaims until the 2d PFA's conditions for lifting the stay are met, violates not only the commitment to AAA arbitration in New York but also the commitment to the exclusivity of FAA review of the resulting awards. *See* Gulf LNG Energy, LLC v. ENI USA Gas Marketing LLC, 242 A.3d 575, 578 (Del. 2020), *cert. denied*, 142 S. Ct. 76 (2021) ("Under the FAA, the courts have the exclusive power to

review and enforce arbitration awards. A party cannot escape the FAA's time-limited and exclusive review procedure by filing a follow-on arbitration attacking the outcome of the prior arbitration").

E.-2.3 *Harm to Claimants if Interim Relief Is Denied Substantially Outweighs Harm to Respondents if Interim Relief is Granted*

106. Respondents are not "harmed" by the interim relief sought. It is interim relief that would simply maintain the current relevant *status quo* in this arbitration, *i.e.* the stay of proceedings on Respondents' counterclaims. Respondents' submissions, taken at face value, do not claim any such harm: they claim to want to see the Foreign Arbitrations terminated. In all events, Respondents' unilateral and unfettered ability to terminate the stay of proceedings on their Counterclaims will remain as it was before the Foreign Arbitrations were commenced. They simply need to comply with our prior awards and orders. And Respondents' motion to vacate our 2d PFA remains submitted to the US District Court for the Southern District of New York.

107. The potential positive effect on the prospects to sell the Company is not a harm to Respondents resulting from the granting of interim relief. It is a merely an attempt to restore the *status quo* in regard to marketability of the Company as it was before the Foreign Arbitrations were started.

E.-3. **Addressing Respondents' Contentions**

E.-3.1 *Deference to the Tribunal in the Foreign Arbitrations*

108. Respondents argued at the oral hearing that: "*The principle of deference to arbitration agreements should apply equally to the arbitrations down there even if we think they are meritless, even if we think they're vexatious.*" (February 2, 2023 Tr. at 105). This argument is not persuasive for the reason stated in the next paragraph.

109. Respondents' argument conflates two different principles into one. One principle concerning arbitration agreements, under the federal and New York arbitration law applicable to this arbitration, is that valid arbitration agreements should be enforced according to their terms by courts or arbitral tribunals having jurisdiction to enforce them, when they are asked to enforce them. *See, e.g,* Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co., 26 N.Y.3d 659, 665 (2016), *citing and quoting from* American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 233 (2013). Neither side here has asked us to enforce the arbitration agreements in the respective constitutive documents of the FACCs. A second principle is

that when an arbitral tribunal decides an issue that has been validly delegated to the tribunal pursuant to an arbitration agreement, judicial review of the tribunal's award on that issue is bound by the scope of review specified in governing arbitration law at the seat of arbitration or (if different) the arbitration law to which the parties have subjected the arbitration agreement. *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); Beijing Shougang Mining Inv. Co. v. Mongolia, 11 F.4th 144, 160-62 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2889 (2022); Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 21-23 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998). Here, we apply the Federal Arbitration Act and Article 75 of the New York CPLR. That is a principle that entails *judicial* "deference" to arbitration awards by courts, not *arbitral* deference to competing arbitrations where issues already submitted to the first tribunal are sought to be arbitrated anew elsewhere. The "*principle of deference to arbitration agreements*" as articulated by Respondents' counsel is not one that exists, to our knowledge, and so we have no occasion to apply it.

E.-3.2 *Tribunal Acting Beyond Its Jurisdiction*

110. Linking the "limited jurisdiction" observation in Respondents' counsel's January 4 email (quoted in paragraph 53 above) with the arguments advanced by Respondents in their subsequent written and oral submissions, we understand Respondents' position to be that the Application is outside our jurisdiction because the SHA makes the question of what to do about the Foreign Arbitrations an issue for the Company's Board, not a dispute between the Shareholders.

111. Summarizing this position at the oral hearing, Respondents argued "*If there truly is a deadlock, if there truly is no path forward and one of us is acting in bad faith, that's when it comes to you and that's when you get to decide for us. But we're not there yet.*" (February 2, 2023 Tr. at 113).

112. We see the matter differently. In our view, any proposal or action or failure to act by a Board member such as Mr. Hernandez, or the Shareholder that appointed the Board member, i.e. Terra, the effect of which is to deprive the other Shareholder or the Company of the *full and complete benefit* of the agreements to arbitrate in the SHA, the Development Agreement, and the S&C Agreement is a violation of the covenant of good faith and fair dealing implicit in the agreements to arbitrate, and implicit in the wider agreements in which those arbitration agreements are situated.

113. By the very terms of Respondents' argument, when one of the Parties has acted in bad faith, the Tribunal may deploy its remedial powers to address the adverse effects of the bad faith conduct. We need

not, according to Respondents' argument, stand aside simply because a member of the Company's Board (Mr. Hernandez), or the Shareholder that appointed him (Terra), purports to seek Board action to rectify the consequences of its own bad faith action and inaction. And here, apparently, if we understand what Respondents assert, we should find that such rectification is in progress. But all that occurred in the time between February 2, 2023, when Respondents during the oral hearing asked us to wait while the Board sought an agreed path forward, and the date of issuance of this Award, is that (i) Terra replaced Mr. Hernandez as a Terra-appointed Board member with William Mendez Araujo, a Terra staff lawyer whose history relevant to this arbitration is recounted in paragraph 17 above, and (ii) Mr. Porter entered his appearance in this arbitration as one of the Respondents' counsel.

114. When the Board member and/or the Shareholder acts in a fashion that suffers the existence of Foreign Arbitrations that raise claims already submitted to arbitration here, *for any period of time*, and seeks to limit what the Board member or Shareholder is prepared to do to terminate those arbitrations, or to balance the professed desire to terminate the Foreign Arbitrations with alleged concern about other risks, there is potentially a breach of that duty of good faith. And once there has been an alleged breach of that duty of good faith, the line is crossed from a matter for Board deliberation to a dispute for resolution by an arbitral tribunal. Claimants by alleging that Mr. Hernandez instigated the Foreign Arbitrations alleged such a breach of the duty of good faith. That made this an arbitrable dispute *prima facie*.

115. Under New York law, "[t]he implied covenant of good faith and fair dealing embraces a pledge that neither party ***shall do anything*** that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract… and is breached when a party acts in a manner that deprives the other party of the benefits of the contract." Parlux Fragrances, LLC v. S. Carter Enters., 204 A.D.3d 72, 91 (1st Dep't 2022) (emphasis supplied) (internal citations and quotation marks omitted).

116. Our finding that Mr. Hernandez has supported the Foreign Arbitrations, made in paras. 71 and 78 above, compels the conclusion that Mr. Hernandez breached the implied covenant of good faith and fair dealing, and that this breach is attributable to the other Respondents, who are under his control. Mr. Hernandez's failure to threaten the Manager Claimants with immediate termination of their DTH employment and Company Manager positions, if they did not immediately withdraw the Foreign Arbitrations, was also such a breach. His failure to have terminated them by now and replaced them with Company Managers who would immediately withdraw the Foreign Arbitration is also such a breach. His inclusion in his proposed Board resolution (Ex. R- 7) of conditions concerning the engagement of Company

counsel, and his omission from that proposed resolution of determinations to replace the Manager Claimants if they failed forthwith to withdraw the Foreign Arbitrations, *i.e.* his fashioning of the Resolution in a way that would require concessions from Claimants and would tend to make the resolution potentially ineffectual, was also such a breach. His failure to immediately convene Shareholder meetings of the direct subsidiaries of the Company that are the Shareholders of the FACCs, to have them revoke or modify the powers of the Manager Claimants with respect to legal proceedings, was also such a breach. All of those breaches are attributable to the other Respondents by reason of Mr. Hernandez's control.

117. Respondents' arguments in favor of deference to the Foreign Arbitrations, and in favor of steps to participate in those arbitrations by defending them, advocate for depriving PPT/AMLQ of the full benefit of the arbitration agreements that apply here, and if adopted would condone continuing breaches of the duty of good faith by Respondents. Indeed, Respondents' choice to make such arguments – while acknowledging that the foreign tribunals lack jurisdiction over PPT/AMLQ and agreeing that the Foreign Arbitrations are "bizarre" (February 2, 2023 Tr. at 102) – itself betrays Respondents true objective to disrupt this proceeding. The characterization of the Foreign Arbitrations as "bizarre" seems indisputable since the proceedings involve subsidiaries seeking damages from their parent company that indirectly wholly owns it, and which Respondents concede could direct the repayment of any such damages back to the parent company.

118. At the oral hearing and in the written evidence, Respondents invoked alleged labor law liability risks as a basis for Respondents reasonably to exercise discretion through their Board members to balance steps to terminate the Foreign Arbitrations with such alleged collateral risks to the Company. Counsel argued: "*I am not an expert in Peruvian or Guatemalan law. We've provided you with expert opinions both of which say in those countries there's a real risk of a labor lawsuit if they're terminated and that that will result in, among other things, embargoing bank accounts.*" (February 2, 2023 Tr. at 120).

119. This argument might resonate if labor law risks at the Company Subsidiary level were being balanced against some other Company objective, but not when balanced against the arbitration agreements. The arbitration agreements are unconditional. They require disputes to be resolved pursuant to their terms, and not elsewhere, and nothing in the arbitration agreements makes their specific enforcement subject to other values the Shareholders might hold dear. If Respondents' argument were accepted, then any of the Shareholders could bring litigation in any desired forum on a dispute arising from the SHA, and argue in opposition to a motion to compel arbitration that the question of arbitration v. litigation is a Board matter, for the Board to determine in its discretion by balancing the collateral risks associated with dispute

resolution in one forum or the other. That is simply not the way these arbitration agreements read, or the way US and New York arbitration law work.[16]

120. For these reasons, Respondents' contention that this is presently a Board matter, not a Tribunal matter, is not accepted.

E.-3.3 *Federal Judicial Anti-Suit Injunction Standards Not Satisfied*

121. Respondents' counsel argued at the hearing that parallel lawsuits arising from the same facts are not unusual, and that under federal case law this circumstance alone is not a basis for an antisuit injunction. Respondents refer to the *Paramedics* case and argue that it is "not uncommon for there to be parallel litigations arising out of the same set of facts." (February 2, 2023 Tr. at 104).

122. But this case involves far more than just parallel lawsuits in two courts on the same facts. Respondents' argument leaves out decisive considerations that go well beyond parallel arbitrations involving parallel underlying facts. Terra got a $112.5 million capital infusion from PPT/AMLQ in 2015 in important part by agreeing to arbitrate disputes in New York in English under AAA Commercial Rules, and representing its own full power and authority to carry out the commitments made in the agreements including this agreement to arbitrate. Terra made those representations of power and authority in the specific context of the fully-disclosed and fully-articulated parent-subsidiary operating structure of Terra's multi-national business.

123. Then Terra submitted its Tower Rejection claims against PPT/AMLQ as Shareholder-derivative Counterclaims in this arbitration in 2021, and submitted written evidence in support of those claims from the Manager Claimants who Respondents now allege to be insubordinate free agent actors. An award we made in 2022, now enforced as a Judgment in the Southern District of New York, requires the Company to be sold. And Respondents, rather than cooperate in putting the Company out for bids and focusing efforts on maximizing the sale price, offer reasons why they lack power, or should be excused from exercising the power they have, to force the FACCs and Manager Claimants to drop the Foreign

[16] In all events, Respondents' contentions that there are genuine labor law liability risks for the Company in potentially terminating employment relationships with the Manager Claimants due to their insubordination, on a matter so fundamental to the Company as the choice of the forum in which to arbitrate $186 million of shareholder-derivative counterclaims, strikes us as highly implausible.

Arbitrations -- arbitrations whose very existence can be expected to chill investor interest in the Company. Such conduct is irrational.

124. A second award we made in 2022, whose enforcement (or vacatur) is *sub judice* in the Southern District of New York, sanctioned Respondents in part by staying prosecution of their Tower Rejection (and other) Counterclaims until they comply with our awards and orders. The Foreign Arbitrations, whatever might be their prospects for early dismissal, (i) stand as a collateral attack on that second award, (ii) stand a better chance of proceeding to the merits than do the Counterclaims in this arbitration, so long as Respondents maintain their refusal to comply with the conditions we have set to lift the stay, and (iii) risk being the vanguard of additional Foreign Arbitrations in the six other countries where Company Subsidiaries run by Company Subsidiary Managers who report to Mr. Hernandez operate the Company's business locally.

125. Therefore it oversimplifies matters unpersuasively to invoke, as Respondents do, a general principle that merely having parallel disputes in different courts is not a sufficient basis for an anti-suit injunction.

126. Respondents also argued that the FACCs and Manager Claimants are not the same parties as those involved here, and that this is determinative against an antisuit injunction under federal antisuit injunction standards. As noted above at paras. 90-97 we have determined to be guided by the New York case law on injunctions to protect agreements to arbitrate, not federal antisuit injunction standards generally. But even if we considered such federal law standards, we would disagree that they lead to the conclusion Respondents would have us draw. The real parties in interest in the Foreign Arbitrations and in this Arbitration are precisely the same. The FACCs in the Foreign Arbitrations have no separate economic interest from that of their ultimate parent company, the Company, and the Manager Claimants stand in the capacity of agents for the FACCs so their own personal economic interests are irrelevant. The damages claimed in those arbitrations belong to the Company and are within its complete control under the SHA – unless the SHA is disregarded, which is one of the moral and legal hazards of the Foreign Arbitrations. So the real parties in interest in Peru and Guatemala are the Company, the Shareholders of the Company, and the controlling shareholders of those Shareholders, *i.e.* the exact same parties that are before us in this case.

F. Conclusion

127. To summarize and reiterate: We disagree with Respondents' conclusion that "*we're not there yet.*" It is a violation of the covenant of good faith and fair dealing for Respondents to advance the position that while they are willing, up to a point, to work toward termination of the Foreign Arbitrations, replacing the Manager Claimants is a step they are unwilling, or even reluctant, to take. It is a violation of the Shareholder Agreement, including its covenant of good faith and fair dealing, for Respondents to assert that the Foreign Arbitrations should be allowed to "*play out*" (February 2, 2023 Tr. at 109), for *any* length of time. There is a violation of the covenant of good faith and fair dealing in the Respondents' response to the Foreign Arbitrations, by their sufferance of them, whether or not they were involved in the commencement of them. So we are "*there*," today, and we will make an Award that requires Respondents to bring about the termination of the Foreign Arbitrations and prevent new ones, and bear financial risk if they fail to do so. [17]

AWARD

1. Respondents shall cause the Foreign Arbitrations to be terminated within 10 days of the date of this Award.

2. Respondents shall notify and submit sufficient proof to this Tribunal of the termination of the Foreign Arbitrations not later than the first business day after the 10th day from the issuance of this Award.

3. Respondents shall prevent the commencement of any similar Foreign Arbitration or other legal proceeding involving all or any of the subject matter of Respondents' counterclaims in this arbitration (as set forth in Respondents' Answer and Counterclaims dated February 19, 2021).

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[17] The Tribunal considered carefully the Parties' proposals for relief, and their written comments on the relief as fashioned by the Tribunal. (The latter were received in response to our invitation to comment on a draft we shared).

We decline to make relief applicable to persons who are not parties to the arbitration, while expressing no opinion as to whether some persons that PPT/AMLQ proposed to be within the scope of relief could become parties.

FRCP 65 is not applicable before this Tribunal; for us in this case the scope of permissible arbitral interim relief in an Award is set by AAA Commercial Rule R-37 in conjunction with Rule R-47(a).

We think the Parties' proposals for injunctive relief are unnecessarily specific as well as more susceptible to potential delays or other evasions, and otherwise stand to be less effective – from compliance and enforcement perspectives -- than the relief we grant. We have carefully considered Respondents' contentions about alleged limits on their capacity in regard to ending the existing Foreign Arbitrations and preventing new ones, and found them to be without merit.

4. Whereas the Tribunal has determined that Respondents have full capacity to bring about the termination of the Foreign Arbitrations, and to prevent the commencement of additional similar Foreign Arbitrations or proceedings, they shall not present in any forum as an excuse for non-compliance with this Award that their efforts to bring about termination of the Foreign Arbitrations, or to prevent the commencement of other similar Foreign Arbitrations or proceedings, were appropriate but unsuccessful.

5. Respondents shall pay the legal fees and expert fees, and related expenses, of PPT/AMLQ and the Company in the pending Foreign Arbitrations and any new Foreign Arbitrations or proceedings promptly upon presentation of invoices, and Respondents shall indemnify and hold harmless the Company and PPT/AMLQ (as defined herein) against any and all damages, liabilities, awards, judgments, costs and expenses that may result from their involvement as parties to the pending Foreign Arbitrations and any new Foreign Arbitrations or proceedings.

6. Should Respondents fail to accomplish the requirements of paragraphs 1 and 2 above within 15 days from the date of this Award, then on that 15th day Respondents shall deposit into an escrow account upon terms acceptable to the Claimants, as security for the full performance of the indemnification obligations imposed in paragraph 5, an amount equal to one-half of the money damages demanded in the Foreign Arbitrations: $41,416,371.17 USD.

7. Should any new Foreign Arbitration or proceeding covered by paragraph 3 above be filed, Respondents shall make additional deposits to the escrow of one-half of the maximum damages demanded. If no reference is made to damages in a specific sum or range, the additional deposit for any such Foreign Arbitration or proceeding shall be $10 million.

8. The terms of the escrow shall provide for release of escrowed funds to the Respondents in whole or in part, upon proof satisfactory to the Claimants of the termination of the Foreign Arbitration(s) or proceeding(s) associated with a particular portion of the escrow.

9. PPT/AMLQ shall be awarded the reasonable legal costs and arbitration costs of this Application. A Procedural Order concerning submissions to be made regarding the costs award, which will be made in a further Partial Final Award, will be issued shortly.

We, THE UNDERSIGNED ARBITRATORS, do hereby certify, for purposes of Article III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded June 10, 1958, and Article 4 of the Inter-American Convention on Commercial Arbitration concluded January 30, 1975, that this Third Partial Final Award is made in New York, New York, USA.

February 22, 2023
Date

Marc J. Goldstein, Chair

February 22, 2023
Date

Mélida N. Hodgson, Arbitrator

February 22, 2023
Date

Richard F. Ziegler, Arbitrator

I, Marc J. Goldstein, Chair, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Third Partial Final Award.

February 22, 2023
Date

Marc J. Goldstein, Chair

I, Mélida N. Hodgson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Third Partial Final Award.

February 22, 2023
Date

Mélida N. Hodgson, Arbitrator

I, Richard F. Ziegler, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Third Partial Final Award.

February 22, 2023
Date

Richard F. Ziegler, Arbitrator